vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4766 OF 1993

The Litel Infrared Systems
Private Limited
J-284, MIDC Bhosari, Pune
through its Managing Director
Shri M.K. Shah ... Petitioner

V/s.

The Regional Provident
Fund Commissioner, Pune ... Respondent

A/W

WRIT PETITION NO.4767 OF 1993

The Litex Electricals
Private Limited
W-134, 'S' Block
MDIC, Bhosari, Pune
through its Director ... Petitioner

V/s.

The Regional Provident
Fund Commissioner, Pune ... Respondent

Mr.D.J. Bhanage for Petitioner
Mrs.Suresh Kumar for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **JANUARY 18, 2007**

ORAL JUDGMENT:

. Both these petitions challenge the same order passed by the Regional Provident Fund Commissioner under section 7A of the Employees Provident Fund and Miscellaneous Provisions Act. By this order, the Regional Provident Fund Commissioner (for short, 'RPFC')

has clubbed the Petitioners in both the petitions and has directed that provident fund should be paid as one unit by both the Petitioners.

2. The undisputed facts in these cases are that M/s.Litex Electricals Private Limited (for short, Litex) was established in 1979. It manufactures lighting and reprographic machines, stage studio overhead projections, etc. Five Directors were running Litex Electricals Pvt. Ltd. since its operations started in 1979. M/s.Litel Infrared Systems Pvt. Ltd. (for short, 'Litel') was established in 1988 and has four Directors. Three of the Directors in the two concerns are common. Litel Infrared Systems Pvt. Ltd. manufactures modules, cassettes, oven electrical panel systems, etc. One of the lamps manufactured by Litex Electricals is used as a component in the products manufactured by Litel Infrared Systems. After the establishment of Litel Infrared Systems in 1988, an application was made by Litel Infrared Systems to the RPFC to allot a separate code number to them as although they were a sister concern of Litex Electricals Private Limited, there was no commonality or functional integrity between the two concerns.

3. An enquiry was instituted under section 7A of

the Act by the Regional Provident Fund Commissioner. Both the Petitioners in this case were heard and by an order dated 5.8.1993, the Commissioner held that Litel Infrared Systems Pvt. Ltd. was a unit of M/s.Litex Electricals Private Limited. On that basis, the RPFC directed payment of provident fund dues for the period from June 1989 to June 1993. This order has been challenged in both the Petitions.

4. The learned advocate appearing for the Petitioners in both these petitions submits that the RPFC has erroneously held that the two concerns could not be clubbed together. He points out that both the concerns were issued separate factory licences. They had separate registrations for sales tax, excise, export and various other laws. Separate water meters and electric meters had been allotted to them by the concerned authorities. He submits that although three Directors were common in both the concerns it could not be said that the two concerns were dependent on each other for their existence and that there was functional integrality between the two. According to the learned advocate, about 42% of the Infrared lamps which were manufactured by Litex Electricals are purchased by Litel Infrared Systems. However, neither of the two units are solely dependent on the other. The lamps which are

purchased by Litel are available in the open market and therefore, Litel can exist without Litex. Apart from that, he points out that the workers employed in the two units are different. Therefore, the two units cannot be considered as one for the purposes of payment of provident fund.

5. The learned Advocate has relied on several judgments both of the High Courts as well as the Supreme Court. In the case of *Isha Steel Treatment, Bombay v/s. Association of Engg. Workers, Bombay & Anr.*, **1987 I CLR 232**, the Supreme court was concerned with the issue of functional integrality while deciding whether there was a genuine closure of an undertaking. While dealing with the issue of functional integrality, the Supreme Court relied on its earlier judgments and held that unity of ownership, supervision and control and the fact that the conditions of service of the workmen of the two concerns were substantially identical were not by themselves sufficient in the eye of law to hold that there was functional integrality between the two mills.

6. Several judgments of the Supreme Court have laid down tests to determine functional integrality between the two units. These include the geographical proximity, commonality of interest, commonality of

funds, unity of ownership, etc. The other judgments relied on by the learned Advocate for the Petitioner are of the Bombay High Court in the case of *Sunder Transport & Anr. v/s. RPFC,* **1992 II CLR 977** and in the case of *Allana Sons Pvt. Ltd v/s. R.M. Gandhi, The RPFC of Maharashtra & Goa,* **1991 I CLR 743** where this Court has held on the basis of facts before it that there were two independent units and that there was no unity or functional integrality between the two. One could not be said to be a branch or department of the other. The judgment of the Karnataka High Court in the case of *New Pai Sales Corporation & Anr. v/s. RPFC,* **FLR 1996 (73) 1283** relies on the judgment in the case *Isha Steel (supra)* to conclude that there was no commonality between the two units before it. The next judgment relied on by the learned Advocate for the Petitioner is of a Division Bench of this Court in the case of *Nandinee Travels Pvt. Ltd. v/s. Regional Provident Fund Commissioner,* **2003 II CLR 58** where the Division Bench has observed as follows:

> 7. Keeping in view the law laid down by the Apex Court in the aforesaid cases, the question that requires to be considered in this proceeding is, whether the petitioner Company can survive even if the trading establishment of other three entities are closed forever. To answer and set aside the test of functional integrality, as is apparent from the impugned order, the respondent has applied only the test

> of geographical proximity and alleged financial dependency to hold that all the said four units can be clubbed together for the purpose of the said Act. Therefore, in our considered view, the facts recorded and test applied by the respondent in the impugned order is not the relevant test to consider the applicability of S.2-A of the said Act. The pre-determining test as inunciated by the Supreme Court is, whether subsequent units would survive on the closure of the petitioner unit and whether in matters of finance and an employment the employer has actually kept the two units in common distinct or integrated. Mere fact of common ownership of the two units and mere location of the two units in common building complex by itself is not sufficient to satisfy the test of functional integrality and further mere common object of common ownership of the two units and mere location of the two units in common premises or building by itself would not be sufficient to satisfy the test of functional integrality. The first and foremost test to establish the functional integrality would be, whether the second unit would survive in the absence of the first unit or when the first unit is closed whether the second unit continue to do its business activity. This aspect has not been noticed by the respondents at all in its impugned order.

7. The learned Advocate for the RPFC relies on the judgment of the Supreme Court in the case of *RPFC, Jaipur* v/s. *Naraini Udyog & Ors.,* **(1996) 5 SCC 522.** He submits that the RPFC has considered all the relevant factors and has concluded that both the units are common and the provident fund contributions must be paid on this basis. He submits that the RPFC has given a fair hearing to the petitioners and has considered all the necessary aspects while deciding the liability of the petitioners. He therefore, submits that no interference

is called for by this Court under Articles 226 and 227 of the Constitution of India.

8. As observed by the Division Bench of this Court in the case of Nandinee Travels Pvt. Ltd. (supra), the foremost test to establish functional integrality would be whether the second unit would survive in the absence of the first unit. The order impugned does not disclose any discussion on this issue at all. The Provident Fund Commissioner was impressed by the fact that there was unity of ownership. The supervision and control of the two units was confined to the three Directors who were common to both the units. The registered office of both the units was the same and on this basis, the Commissioner concluded that there was functional integrality. However, as noticed above, the principle test is whether one unit would survive without the others which is a factor that must be considered by the Commissioner before concluding that there was functional integrality between the two concerns or that one was a unit of the other. This discussion is absent in the impugned order.

9. In the circumstances of the case, it would be appropriate to remand the matter to the RPFC to rehear the matter. Accordingly, the matters are remanded to

the RPFC, Pune. The RPFC will give notice to M/s. Litel Infrared Systems Pvt. Ltd. and M/s.Litex Electricals Pvt. Ltd. of the hearing and will decide the issue in the light of the aforesaid judgments. This entire process shall be completed within six months from today.

10. All contentions of the parties are kept open.

11. Both the Writ Petitions are disposed off accordingly.